Bank Utama (Malaysia) Bhd v Sistem Bis Komputer Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-297-90
JAMES FOONG J
4 FEBRUARY 1994

Civil Procedure *— Time — Appeal — Extension of time — Notice of appeal filed out of time — Application for extension made 1½ years later — Mistake of previous solicitor only recently discovered by present solicitors — Whether court could grant extension — Rules of the High Court 1980 O 3 r 5(1)*

The appellant applied for an enlargement of time under O 3 r 5(1) of the Rules of the High Court 1980 ('the Rules') to file its notice of appeal against the decision of the senior assistant registrar ('the SAR') and/or that the notice of appeal dated 8 July 1992, which was filed two days out of time, be treated as filed within the time stated in O 56 r 1(3) of the Rules. The application for enlargement of time was made almost 1½ years after the notice of appeal was filed, the reason given by the appellant being that its present solicitors had only then realized that the notice of appeal had been filed out of time. Counsel for the appellant submitted that no time limit was set by the Rules for the making of an application for enlargement of time.

Held, dismissing the application:

(1) In considering an application for enlargement of time, the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must be taken into account. The court should consider whether the delay had prejudiced the respondent.

(2) Though no time limit was specified in the Rules or by any statute for filing an application for enlargement of time to file a notice of appeal, such application should be made within reasonable time. The longer the delay, the greater the likelihood of prejudice to the opposite party.

(3) In this case, the delay of almost 1½ years was unreasonable. The mistake of the plaintiff's previous solicitor could not constitute sufficient ground for the granting of an extension of time to file the notice of appeal.

Per curiam:

Where the time limit for filing a notice of appeal has passed, an application should first be made for enlargement of time to file the notice of appeal. Only when such an application is granted, should a notice of appeal out of time be filed.

A [**Bahasa Malaysia summary**

Perayu telah memohon suatu perlanjutan masa di bawah A 3 k 5(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu') untuk memfailkan notis rayuannya terhadap keputusan penolong kanan pendaftar ('PKP') dan/atau bahawa notis rayuannya yang bertarikh B 8 Julai 1992, yang telah difailkan dua hari lewat, disifatkan sebagai telah difailkan dalam masa yang ditetapkan di dalam A 56 k 1(3) Kaedah itu. Permohonan untuk perlanjutan masa ini telah dibuat hampir 1½ tahun selepas notis rayuan itu difailkan, dan sebab yang diberikan oleh perayu adalah bahawa peguamcaranya pada masa kini C hanya menyedari baru-baru ini bahawa notis rayuan itu tidak difailkan dalam masa yang ditetapkan. Peguambela bagi pihak perayu telah berhujah bahawa tidak ada had masa yang ditetapkan oleh Kaedah itu bagi membuat suatu permohonan untuk perlanjutan masa.

Diputuskan, menolak permohonan itu:

D (1) Apabila mempertimbangkan sesuatu permohonan untuk perlanjutan masa, fakta dan keadaan yang berkenaan dengan kelengahan di dalam memfailkan notis rayuan dan juga permohonan untuk perlanjutan masa itu mesti diambil kira. Mahkamah mesti juga mempertimbangkan sama ada kelengahan E itu telah memudaratkan responden.

(2) Walaupun suatu had masa tidak ditetapkan di dalam Kaedah itu ataupun sebarang statut lain bagi memfailkan suatu permohonan untuk perlanjutan masa bagi memfailkan suatu notis rayuan, sesuatu permohonan sedemikian seharusnya dibuat dalam masa yang munasabah. Semakin lama kelengahan itu, semakin tinggi F kemungkinannya bahawa pihak yang bertentangan akan dimudaratkan.

(3) Di dalam kes ini, kelengahan selama hampir 1½ tahun tidak munasabah. Kesilapan yang telah dilakukan oleh peguamcara terdahulu perayu tidak merupakan alasan yang mencukupi untuk G membenarkan suatu perlanjutan masa bagi memfailkan notis rayuan.

Per curiam:

Di mana had masa untuk memfailkan suatu notis rayuan telah berlalu, H suatu permohonan mesti dibuat terlebih dahulu untuk melanjutkan masa bagi memfailkan notis rayuan itu. Hanya selepas permohonan itu dibenarkan, barulah notis rayuan itu boleh difailkan di luar had masanya.]

I **Notes**

For cases on extension of time, see 2 *Mallal's Digest* (4th Ed) paras 2309–2324, 2333–2336; [1991] Mallal's Digest 499–501; [1993] Mallal's Digest 317.

Cases referred to

Development & Commercial Bank Bhd v Tan Ong Hwa & Anor [1992] 2 MLJ 764 (folld)

Tractors (M) Bhd v Southern Estates Sdn Bhd & Anor [1984] 1 MLJ 118 (folld)

Legislation referred to

Rules of the High Court 1980 O 3 r 5(1), O 14, O 56 r 1(3)

WM Chang (*Raja, Darryl & Loh*) for the appellant.
S Siva (*Cheah, Teh & Su*) for the respondents.

James Foong J: This is an application (encl 51) by the plaintiff [appellant] for, inter alia, the following orders:

(a) that the plaintiff be granted enlargement of time to file the notice of appeal against the decision of the senior assistant registrar ('the SAR') granted against the plaintiff on 30 June 1992; and/or

(b) that the notice of appeal dated 8 July 1992 filed by the plaintiff against the said SAR's decision be treated as filed within time.

The facts of this case are as follows. On 30 June 1992, the senior assistant registrar dismissed the plaintiff's application to enter final judgment against the defendants [respondents]. The dismissal was apparently on a preliminary issue taken by the defendants. The plaintiff's solicitor then filed a notice of appeal to the judge on 8 July 1992, under O 56 r 1(3) of the Rules of the High Court 1980 ('the Rules'). The time limit to file this appeal must be within five days from date of the SAR's decision. By filing the notice of appeal on 8 July 1992, the plaintiff was two days out of time. This situation remained as it was for almost 1½ years until the plaintiff's new solicitors realized that an application should be made for enlargement of time since the notice of appeal was filed out of time. To remedy this situation, they are now making this application.

The main reason given by the plaintiff for the delay in filing the notice of appeal is that it required instructions to appeal from its head office in Sarawak. By the time this instruction for appeal came through, it was two days late in filing the notice of appeal. Further, the plaintiff seems to blame its previous solicitor for not making this application for enlargement of time as soon as possible. Nevertheless, the plaintiff's counsel argued that nowhere in the Rules is there a time frame set for making this application.

The plaintiff's counsel also submitted that under O 3 r 5(1) of the Rules, this court may order extension or abridgement of time.

After hearing submissions by both counsel and after considering the facts of this case and the authorities as tendered by both parties, I dismissed the plaintiff's application.

A The principles to be applied for the consideration of whether to grant or refuse an application of this nature are as follows:

(1) the length of the delay;

(2) the reasons for the delay;

B (3) the chances of the appeal succeeding if time for appeal is extended; and

(4) the degree of prejudice to the respondent if the application is granted. (See the case of *Development & Commercial Bank Bhd v Tan Ong Hwa & Anor* [1992] 2 MLJ 764.)

C However in this case, two stages are involved. The first being the plaintiff's filing the notice of appeal two days out of time and the second involves the plaintiff making this application for enlargement of time about 1½ years later. For the latter, as submitted by plaintiff's counsel there is no time limit.

D In the case of *Development & Commercial Bank Bhd v Tan Ong Hwa & Anor* [1992] 2 MLJ 764, when the notice of appeal was filed out of time, it was rejected by the court officials. This led the applicant in that case to file an application for enlargement of time about 2½ months later. In this present case, there was no rejection of the notice of appeal filed out of time. Presumably, the plaintiff only became aware of the necessity to make E an application for enlargement of time when the new solicitors took over this matter much later.

When a court of law considers such an application of this nature the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must be taken into F account and the principles as stated in the *D & C Bank* case should be considered equally in both situations and as a whole. This would mean that this court should also consider the length of and reason for the delay in filing the application for enlargement of time in this case and, whether this lateness in application would prejudice the respondent.

G Though no time limit is specified in the Rules or by any statute for the filing of an application for the enlargement of time to file a notice of appeal, by natural justice such application should be made within reasonable time. What is reasonable would depend on the circumstances. A notice of appeal may be filed two days late, but in law it is still a defective notice. What is essential then is for the party concerned to take immediate steps H to file an application for enlargement of time to file the notice of appeal out of time. The longer the delay in the filing of an application of such a nature, the greater is the likelihood of prejudice to the opposite party. It is no point to keep a defective notice of appeal though filed only a few days late and make an application for enlargement of time many years later. The correct procedure is of course not to file any defective notice of appeal I when a party is out of time.

An application should first be made for enlargement of time to file the notice of appeal and when such an application is granted, then only

should a notice of appeal out of time be filed. Unfortunately as in many cases, parties only become aware of a defective notice filed out of time after having filed the same. When an application for enlargement of time is made, the defective notice of when it was filed is often used as a piece of evidence to indicate the length of the delay. As I have stated earlier, consideration must not only be limited to when a party decides to file this appeal but, also as to when a proper application is made for enlargement of time to file the notice of appeal out of time.

Based on the facts and circumstances of this case, I find that this application (encl 51) made almost 1½ years after the plaintiff's intention to appeal is unreasonable. The reason for the cause of this delay was, as expressed by the plaintiff's counsel due to the mistake of the plaintiff's previous solicitor. Such error on a point of law cannot constitute sufficient ground for the granting of an extension of time to file a notice of appeal. (See *Tractors (M) Bhd v Southern Estates Sdn Bhd* [1984] 1 MLJ 118.) Further, the decision of the SAR which the plaintiff wishes to appeal against is on an O 14 application for final judgment against the defendants. One of the essential ingredients of such an application is the time factor. Any delay in the making of this application would render it defective.

Concurrently, a delay of 1½ years to make this application which is against a decision of an application where time was essential, would affect the principle of urgency in that very application itself. This would certainly cast grave doubts on the probability of the success of this appeal.

The defendants in this case are certainly prejudiced. For 1½ years they were in bliss that an O 14 application for final judgment had been decided and determined. Now they have to again defend such an application at an appeal level if this application for enlargement of time is allowed.

I am at a loss as to why the present solicitors of the plaintiff care to pursue this application to set aside asking for even further argument. As the decision appealed against is on a summary judgment under O 14, the plaintiff would be better off in accepting the decision of the learned SAR and set this case for hearing. In my opinion, this case, if set down for trial immediately after the SAR's decision, would most likely have been heard and disposed of at a full hearing by now.

I therefore dismiss the plaintiff's application with costs.

Application dismissed.

Reported by Anne Khoo